**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re:	:	**CHAPTER 11**
400 WALNUT ASSOCIATES, L.P.	:	**CASE NO. 10-16094(SR)**
Debtor	:	

**REPLY BRIEF OF THE DEBTOR TO THE MEMORANDUM
OF LAW FILED BY 4TH WALNUT ASSOCIATES, L.P.**

400 WALNUT ASSOCIATES, L.P. (the "Debtor"), by and through its counsel, Maschmeyer Karalis P.C., hereby submits this Reply Brief in response to the Memorandum of Law filed by 4TH WALNUT ASSOCIATES, L.P. ("4th Walnut"), (a) in opposition to the Debtor's Motion for authority to use "cash collateral" in accordance with 11 U.S.C. § 363 and (b) in support of 4th Walnut's Objection and Cross-Motion to prohibit use of, segregate and account for rents ("4th Walnut's Memo"), and in support thereof, respectfully states as follows:

INTRODUCTION

On January 6, 2010, the Debtor submitted a Memorandum of Law (the "Debtor's Memo") in support of its position that it has an interest in the rents from the Property it owns and that the rents from said Property constitute "cash collateral" under 11 U.S.C. § 363.[1] In so doing, the Debtor raised four (4) independent threshold reasons why the Debtor has an interest in the rents produced by the Property.

[1] To avoid burdening this Honorable Court with duplicative statements of facts and unnecessary repetition, the Debtor respectfully incorporates herein the Debtor's Memo. See, Bankr. Doc. No. 170. In so doing, the Debtor not only incorporates every argument raised in the Memorandum itself, but also the definitions of specific terms contained therein and the various exhibits adduced thereto.

The first threshold reason, that the rent assignment provision embodied in the Mortgage does not contain an absolute assignment of the rents has two subparts – (i) that the ambiguous and conflicting language used in the Mortgage clearly shows that the pertinent rent assignment provision should be construed simply as a pledge of security and not an absolute assignment of rents and (ii) that the assignment provision specifically provides that the Debtor retains all excess rents after payment of the monthly installments due 4th Walnut and the operating expenses, free and clear of, and released from, 4th Walnut's rights in the rents under the Mortgage. See, Debtor's Memo, at pp. 19-29. Since the language at issue, which 4th Walnut asserts provides an absolute assignment of rents in favor of the lender also provides that the Debtor has a right to all excess rents, free and clear of, and released from, 4th Walnut's rights in the rents under the Mortgage, the alleged assignment is obviously not "absolute". See, Exhibit "D-2", at § 3(b), pp. 7-8. The assignment provision within the Mortgage cannot be absolute, if it provides that the Debtor is entitled to the excess rents. Further, under the Bankruptcy Code, the Debtor can cure the "pre-petition default" thereby eliminating the "pre-petition default" from being a continuing default and preserving the Debtor's interest in the excess rents for the benefit of its estate. See, 11 U.S.C §§ 1123(a)(5)(G) and 1124(2)(A).

Second, after Sovereign Bank declared a default under the Sovereign Loan and demanded the rents in question, it thereafter reached an agreement with the Debtor whereby the Debtor was once again authorized to continue to collect the rents from the Property. Id., at pp. 30-35. Third, at the time the instant bankruptcy petition was filed, the Debtor was in "actual" physical "possession" of the Property and thus, as of the petition date, had dominion and control over the rents produced by the Property. Id., at pp. 35-44. In other words, before said bankruptcy petition was filed, assuming arguendo that the rent assignment provision in the Mortgage was absolute, which it is not, or that there was no agreement after the default was declared, which there was, 4th Walnut did not prior to the Petition Date take "possession" of the Property in accordance with applicable Pennsylvania law. Id., at pp. 42-44. Fourth, the Debtor is entitled to collect all rents arising from leases entered into post-petition between the Debtor and new tenants at the Property and the rents from these post-petition leases qualify as "cash collateral" under 11 U.S.C. § 363(a). Id., at pp. 44-46. As of the December 9, 2010 hearing, the Debtor had entered into twenty (20) post-petition leases and continues to aggressively market the vacant apartment units and the commercial space at the Property for lease and expects to enter into additional post-petition leases with new tenants for the Property. Id., at pp. 15, 46. See also, T, at pp. 40-42.

Against this backdrop, on the same date the Debtor's Memo was filed, the 4th Walnut's Memo was also filed. In the 4th Walnut's Memo, 4th Walnut has argued that the rents in question are not "cash collateral" because the Debtor had no interest in those rents at the time the bankruptcy petition was filed. See, 4th Walnut's Memo, at ¶¶ 25-40, pp. 6-11. Of course, the 4th Walnut argument (a) assumes that the rent assignment provision within the Mortgage is absolute, which it is not, (b) ignores the undisputed fact that Sovereign Bank subsequent to declaring a default, demanding the rents, and commencing the Foreclosure Action by letters dated January 29, 2010, authorized the Debtor and Greentree to collect the rents from the Property, (c) assumes that 4th Walnut took the appropriate action prior to the Petition Date to take possession of the Property, which it did not, and (d) fails to address the Debtor's right to the rents from leases entered into post-petition by the Debtor with new tenants at the Property.

At the same time, 4th Walnut has failed to address the fact that Sovereign Bank, after declaring a default and having demanded that the tenants at the Property pay the rents to Sovereign Bank, reached an agreement with the Debtor whereby Sovereign Bank and the Debtor issued the January 29th Letters (*as hereinafter defined*) directing all tenants at the Property to pay all rents to Greentree. It is an undisputed fact that after the default was declared and Sovereign Bank demanded the rents, Sovereign Bank issued the January 29th Letters (*as hereinafter defined*) that reauthorized the landlord to collect the rents from the Property.

Instead, 4th Walnut has contended that the Debtor's position regarding the existence of the Forbearance Agreement is barred by: (a) the Statute of Frauds; (b) the parties' communications; (c) the lack of mutual assent to any material terms; and (d) the absence of any consideration flowing to Sovereign Bank and therefore, the Forbearance Agreement cannot constitute a basis for a finding that 4th Walnut, or Sovereign Bank before it, was precluded from exercising its legal and contractual rights. Id., at ¶ 103, p. 30. These arguments and contentions nonetheless fail. The reasoning behind this conclusion is relatively simple.

ARGUMENT

A. In This Matter, As Demonstrated By The Relevant Pleadings And The Memorandum Of Law Submitted By The Debtor On January 6, 2011, The Failure To Take Possession Of The Rents In Question Prior To The Petition Date, Qualify Those Rents As Cash Collateral Under 11 U.S.C. § 363(a)

4th Walnut has argued that the rents in question are not "cash collateral" because the Debtor had no interest in those rents at the time the bankruptcy petition was filed. See, p. 3, supra. This of course assumes that the underlying assignment is absolute, which it is not.

The following facts are undisputed:

(a) Sovereign Bank declared a default under the Loan Documents as of November 9, 2009. See, e.g., T, at p. 28. See also, Exhibit "L-7"; Debtor's Memo, at pp. 6-7 and 30;

(b) During the the month of December 2009, Sovereign Bank sent notices to all of the tenants residing at the Property directing them to remit their rent payments directly to Sovereign Bank. See, e.g., T, at p. 28. See also, Exhibit "L-8", Debtor's Memo, at pp. 6-7 and 30; and

(c) On January 29, 2010, Sovereign Bank commenced the Foreclosure Action. See, Bankr. Doc. No. 90 - Exhibit "D-2" attached to the Debtor's Response and Affirmative Defenses to the Objection and Cross Motion.

However, 4th Walnut mischaracterizes the writings regarding the collection of rents after Sovereign Bank declared a default in November 2009, demanded the rents from the tenants in December 2009 and commenced the Foreclosure Action in January 2010. The last written communication by Sovereign Bank regarding the collection of the rents from the Property are the joint letters dated January 29, 2010 addressed and hand delivered to each tenant at the Property whereby Sovereign Bank directed each tenant to pay their rent to Greentree and thereby once again authorized the Debtor and Greentree to collect the rents from the Property (the "January 29th Letters"). See, Exhibit "D-3". The January 29th Letters state, inter alia, as follows:

> "... By letters dated December 4 and 31, 2009, you were notified by the Bank to remit all rents due and owing under your lease with 400 Walnut Greentree Associates, LP (the "Landlord") to Sovereign Bank. By letters dated December 18, 2009 and January 14, 2010, you were asked by your Landlord to remit your rent payments directly to your Landlord, notwithstanding the instructions from the Bank.
>
> In order to allay the confusion, the Bank and your Landlord hereby jointly request that you forthwith make all lease payments in accordance with the terms of your lease to:
>
> 400 Walnut Greentree Associates, LP
> 1700 Walnut Street
> Philadelphia, PA 19106

See, Exhibit D-3. The January 29th Letters are addressed to each tenant at the Property and clearly direct each tenant to pay the rents to Greentree. The January 29th Letters were issued after Sovereign Bank declared a default, had demanded the rents from the tenants and had commenced the Foreclosure Action. The January 29th Letters were never rescinded by Sovereign Bank and remained in force as of the Petition Date.[2]

Instead of addressing the January 29th Letters, 4th Walnut has made references to following:

"... • On July 2, 2010, 4th Walnut provided Debtor with the 4th Walnut Demand Notice, which, among other things: (a) notified the Debtor that the Debtor's license to collect Rents from the Property was revoked; and (b) demanded the immediate turnover of all Rents in possession of the Debtor;

- Under the terms of the SNDA, the exercise by 4th Walnut of the Assignment of Rents pursuant to the 4th Walnut Demand Notice constituted a 'Transfer' such that the Master Lease was, at the latest, as of July 2, 2010 (the date of 4th Walnut's Demand Notice) [footnote omitted] considered to be a direct lease between 4th Walnut and Greentree, divesting the Debtor from any interest in that Master Lease or to the Rents derived from the Master Lease (which included the Rents collected by Greentree from subtenants);

- Also on July 2, 2010, 4th Walnut sent Greentree the Greentree Demand Notice: (a) informing Greentree of the Debtor's default; (b) informing Greentree of the revocation of the Debtor's license to collect Rents; and (c) demanding payment by July 16, 2010 of all Rents owed or to be owed by Greentree under the Master Lease;

- The Greentree Demand Notice is an additional 'Transfer' under the terms of the SNDA; Greentree made no

[2] The June 17, 2010 letter from Matthew Maiorino to John J. Turchi Jr. references theprior Sovereign Bank default letter dated November 13, 2009 and the rent demand letters dated December 4, 8, and 31, 2009. However, it fails to acknowledge, address or reference the January 29th Letters.

> payments to 4th Walnut, and 4th Walnut subsequently, on July 22, 2010, terminated the Master Lease . . ."

Id., at ¶ 37, p. 10. However, 4th Walnut has failed to address that the January 29th Letters were not terminated or rescinded by Sovereign Bank. The importance behind this factual finding is that the January 29th Letters are in direct conflict with 4th Walnut's assertion that "the Debtor's license to collect Rents from the Property was revoked." In fact, Sovereign Bank, through the January 29th Letters, specifically told each tenant at the Property that despite Sovereign Bank's prior demand, all future rents were to be paid to the landlord.

Against these partial references to the relevant background at hand, 4th Walnut has also relied on the Third Circuit's decision in Commerce Bank v. Mountain View Village, 5 F.3d 34 (3rd Cir. 1993), in further support of its initial argument to contend:

> " . . . [i]n Mountain View, the Third Circuit considered a mortgagor/debtor's right to use rents from mortgaged property as cash collateral. Mountain View was the owner of an apartment complex that issued Harris Savings Bank ('Harris') and Commerce Bank ('Commerce') mortgages on various phases of the apartment project. ***The Harris mortgages included absolute assignments of rents and were properly recorded; Commerce was granted an assignment of rents separate from the mortgage, but properly recorded both documents. When Mountain View defaulted on the mortgages, Harris notified the tenants of the default, began to collect rents and eventually entered a judgment in foreclosure and 'occupied the premises to the exclusion of Mountain View.'*** Id., at 36. ***Commerce also took possession of the phase of the project in which it held a mortgage, began to collect rents and entered a judgment in foreclosure.*** Before a sheriff's sale could take place, Mountain View filed for bankruptcy protection and moved against Harris and Commerce for use of cash collateral. The bankruptcy court held that the debtor retained an equitable interest in the rents and allowed the use of cash collateral. The banks appealed. The District Court held that the rents were not property of the estate and reversed the bankruptcy court; the debtor appealed . . ." (***emphasis ours***)

See, 4th Walnut's Memo, at ¶ 28, p. 7. That said, 4th Walnut has then proceeded to argue as follows:

> " . . . [i]n the instant case, the facts are similar to Mountain View: the Debtor/mortgagor defaulted on its mortgage, the lender/mortgagee took constructive possession of the mortgaged property and presented the tenant(s)

> with rent demand notices prior to the Debtor filing for bankruptcy protection. Therefore, the same result logically follows, and the interests of the mortgagee, in this case, 4th Walnut, in the Rents prevails . . ."

Id., at ¶ 34, p. 9. The facts in our case are different from the facts in Mountain View. Needless to say, 4th Walnut's arguments and contentions are obviously misplaced. The reasoning behind this observation is certainly simple.

In short, there is no doubt that there was indeed a pre-petition default under the Loan Documents. However, there is also no doubt either that, after the default was declared, rents demanded, and the Foreclosure Action commenced, Sovereign Bank instructed all of the tenants at the Property to remit their rents to Greentree, thereby allowing both the Debtor and Greentree to continue to collect the rents from the Property. See, e.g., Exhibit "D-3". This being so, and despite 4th Walnut's arguments to the contrary, it is obvious that, at the time the instant bankruptcy petition was filed, the Debtor indeed had an interest in the rents derived from the Property it owns.

Despite 4th Walnut's assertion that the facts in our case are similar to Mountain View, they are not. Our case is distinguishable from Mountain View as follows:

a. The assignment of rents provision in the Mortgage in our case is not an "absolute assignment of rents" whereas in Mountain View it was an absolute assignment. See, e.g., Mountain View, supra, 5 F.3d at 35;

b. Subsequent, to Sovereign Bank declaring a default in November 2009, demanding the rents from the tenants in December 2009 and commencing the Foreclosure Action in January 2011, Sovereign Bank through the January 29th Letters, once again authorized the Debtor and Greentree to collect the rents from the Property. The January 29th Letters were still in force as of the Petition Date whereas, in Mountain View, the lender did not authorize the borrower to resume collecting rents after the default was declared, the lender had demanded the rents from the tenants and the lender had commenced a foreclosure action. See, id., at 35-36;

c. Although Sovereign Bank filed the Foreclosure Action they agreed on January 29, 2010 not to take any further action to prosecute it and subsequent to filing the Foreclosure Action, took no further action. On July 23, 2010, 4th Walnut by Praecipe discontinued and ended the Foreclosure Action. A true and correct copy of the Praecipe to Discontinue, without prejudice, the Foreclosure Action was attached as Exhibit "D-4" to the Debtor's Response to the Objection and Cross Motion. Whereas, in Mountain View, before the bankruptcy case was filed, the lender prosecuted the foreclosure action, obtained a judgment in foreclosure and had a sheriff sale scheduled. None of these events occurred in our case. See, e.g., Mountain View, supra, 5 F.3d at 36;

d. After Sovereign Bank declared a default, demanded the rents from the Property and commenced the Foreclosure Action, Sovereign Bank reached an agreement with the Debtor that resolved the default whereas in Mountain View, no agreement was reached between the lender and borrower. See, id., at 35-36; and

e. As of the Petition Date, the Debtor was still collecting the rents from the Property whereas, in Mountain View, the lender had taken possession of the property and begun to collect the rents prior to the bankruptcy case being filed. See, id., at 36.

Thus, as reflected above, the result in Mountain View does not apply to the facts of our case.

Based upon these factual findings and 4th Walnut's ultimate reliance on the Third Circuit's decision in Mountain View, it is important to reiterate that before the instant bankruptcy petition was filed, 4th Walnut at no time proceeded to validly enforce its rent assignment rights by taking "possession" of the Property in accordance with applicable Pennsylvania law. See, In re Foxcroft Square Co., 178 B.R. 659, 662-63 (E.D. Pa. 1995) citing

In re SeSide Co., 152 B.R. 878, 884 (E.D. Pa. 1993). See also, In re TM Carlton House Partners, 91 B.R. 349, 353 (Bankr. E.D. Pa. 1988); Mackay's Estate, 1936 Pa. Dist. & Cnty. Dec. LEXIS 33, at *2-*3, 25 Pa. D. & C. 544, 545-46 (Pa. C.P. Feb. 28, 1936); Miles v. Abe Kolsky & Co., 1930 Pa. Dist. & Cnty. Dec. LEXIS 234, at *9, 13 Pa. D. & C. 579, 581 (Pa. C.P. June 30, 1930). The reasoning behind this conclusion is relatively simple.

In Pennsylvania, the right of a mortgagee to receive rents, even when the mortgage contains an assignment provision, is grounded on "possession" of the underlying realty. See, e.g., In re D'Anna, 177 B.R. 819, 824 (Bankr. E.D. Pa. 1995). See also, Manufacturers Life Ins. Co. (USA) v. Stacey's Buffet, 1995 U.S. Dist. LEXIS 18126, at *5 (E.D. Pa. Nov. 29, 1995); Peoples-Pittsburgh Trust Co. v. Henshaw, 141 Pa. Super. 585, 592, 15 A.2d 711, 715-16 (1940). That said, a mortgagee can obtain "possession" of realty and consequently obtain a present right to receive rents in two (2) ways: (a) by entering into "actual possession" of the real estate through foreclosure or by acting as a mortgagee-in-possession; or (b) by taking "constructive possession" of the realty by serving demand notices on the mortgagor's tenants and requesting direct payment of the rent to it. See, Bulger v. Wilderman, 101 Pa. Super. 168, 176-77, 1931 Pa. Super. LEXIS 307, at *13-*14 (Pa. Super. Ct. Feb. 27, 1931). See also, Foxcroft Square Co., supra, 178 B.R. at 663 citing SeSide Co., supra, 152 B.R. at 884; Fidelity Title & Trust Co. v. Garrett, 327 Pa. 305, 310, 194 A. 398, 400 (1937).

Accordingly, before a creditor takes "possession" of the rents, even after an event of default has occurred, Pennsylvania law holds that the rents continue under the dominion of the mortgagor to be used at its direction. See, In re Dupell, 235 B.R. 783, 792-93 (Bankr. E.D. Pa. 1999). See also, In re Union Meeting Partners, 163 B.R. 229, 236 (Bankr. E.D. Pa. 1994) (*concluding "only that the [d]ebtor's right to use the rents prior to [lender's]* *enforcement of its lien is 'an interest of the debtor in property'"*). As it has been held by this Bankruptcy Court:

> " . . . until a mortgagee enforces its rights to rentals by taking 'possession' of the mortgaged property, ***the mortgagee has no present rights to rents under Pennsylvania law, and a mortgagor is entitled to continue receiving the rents from the property.*** See SeSide, 152 Bankr. at 883, citing Randal, 306 Pa. at 5, 158 A. at 865-66; Colbassani, 159 Pa. Super. at 417, 48 A.2d at 107; Miners Sav. Bank of Pittston v. Thomas, 140 Pa. Super. 5, 8, 12 A.2d 810, 813 (1940). ***This is so even though the mortgagee has a valid and enforceable interest in lien on the rental income stream.*** Mountain View, 5 F.3d at 38 . . ." (***emphasis added***)

See, D'Anna, supra, 177 B.R. at 825. See also, Shallcross v. Rankin, 82 F.2d 690, 691-92 (3rd Cir. 1936) (*recognizing that "[t]he rule of law seems to be well established that when a mortgage is in default, a mortgagee out of possession is not entitled to rents, issues, and profits until he gives notice of his claim to them and takes possession, actual or constructive, of the mortgaged premises"*); Manufacturers Life Ins., supra, 1995 U.S. Dist. LEXIS 18126, at *5 citing Mountain View, supra, 5 F.3d at 38 (*acknowledging that "[a] mortgagee may not demand rents from tenants until it obtains actual possession of the realty or constructive possession by serving demand notices on the mortgagor's tenants"*); Foxcroft Square Co., supra, 178 B.R. at 662-63 citing SeSide Co., supra, 152 B.R. at 884 (*holding that "[t]he mortgagee does not have a present right to demand rights from tenants until it obtains either actual or constructive possession of the realty"*); In re Wynnewood House Assoc., 121 B.R. 716, 721 (Bankr. E.D. Pa. 1990) (*observing that "[u]ntil the mortgagee obtains possession, the mortgagor is generally entitled to receive all rents from the realty"*); Bulger, supra, 101 Pa. Super. at 177, 1931 Pa. Super. LEXIS 307, at *15 (*concluding that "a payment of rent by tenants to mortgagee was held not to relieve them as to the claim of their mortgagor landlord's assignee, because there was no proof of any demand by the mortgagee on the tenants for the rent or notification by them to pay the rent to her"*); Abraham Rosenblatt Bldg. & Loan Ass'n

v. Miller, 1929 Pa. Dist. & Cnty. Dec. LEXIS 54, at *6, 13 Pa. D. & C. 73, 75 (Pa. C.P. Dec. 31, 1929) (*reiterating that, in Pennsylvania, "even where a mortgage covers rents, issues and profits, it is held to be a lien on the land only, and such words apply only to rents after the mortgagee has taken possession, and until that time they belong to the mortgagor"*).

As indicated above, the 4th Walnut notices sent on July 2, 2010 to both the Debtor and Greentree indicating, among other things, that "the Debtor's license to collect rents from the Property was revoked is simply not accurate and in direct contravention to the January 29th Letters and the deal struck with Sovereign Bank See, Exhibit "D-3". The relevant record also reflects that, after the bankruptcy petition was filed on July 23, 2010, 4th Walnut proceeded to send notices by mail to all of the tenants at the Property "notifying them of the Rent Exercise and the Master Lease Termination," and directing them to remit their rent payments directly to 4th Walnut. See, Bankr. Doc. No. 90 - Response and Affirmative Defenses to the Objection and Cross Motion, at ¶ 52, p. 16. See also, Debtor's Memo, at p. 42 citing Bankr. Doc. No. 81 – Objection and Cross Motion, at ¶ 15.

In other words, as reflected by the relevant record, the Debtor filed its bankruptcy petition for reorganization in "actual" physical "possession" of the Property and, in so doing, entered into bankruptcy exercising dominion and control over the rents produced by said Property. See, Dupell, supra, 235 B.R. at 792-93. See also, Shallcross, supra, 82 F.2d at 691-92; D'Anna, supra, 177 B.R. at 825; Colbassani v. Society of Christopher Columbus, 159 Pa. Super. 414, 416, 48 A.2d 106, 107 (1946); Abraham Rosenblatt Bldg., supra, 1929 Pa. Dist. & Cnty. Dec. LEXIS 54, at *6, 13 Pa. D. & C. at 75. Specifically, before the bankruptcy petition was filed, 4th Walnut at no time proceeded to validly enforce its rent assignment rights by taking "possession" of the Property in accordance with applicable Pennsylvania law. See, Foxcroft Square Co., supra, 178 B.R. at 662-63 citing SeSide Co., supra, 152 B.R. at 884. See also, TM Carlton House Partners, supra, 91 B.R. at 353; Mackay's Estate, supra, 1936 Pa. Dist. & Cnty. Dec. LEXIS 33, at *2-*3, 25 Pa. D. & C. at 545-46; Kolsky & Co., supra, 1930 Pa. Dist. & Cnty. Dec. LEXIS 234, at *9, 13 Pa. D. & C. at 581. Thus, as reflected by this record, it was not until the instant bankruptcy petition was actually filed that 4th Walnut proceeded to enforce its rent assignment rights and attempt to take "constructive possession" of the underlying realty.

Ordinarily, outside of bankruptcy, there would be nothing to prevent a mortgagee from sending notification of a given rent assignment to the mortgagor's tenants and gain "constructive possession" of their units. See, e.g., Dupell, supra, 235 B.R. at 794. In this matter, however, the intervention of bankruptcy leads to a different result. Id. Further, the action taken by 4th Walnut was in direct contravention of the actions taken by Sovereign Bank in allowing both the Debtor and Greentree to continue to collect the rents from the Property. See, p. 6, supra.

Following the bankruptcy filing, the automatic stay provisions embodied in 11 U.S.C. § 362(a) came into play to enjoin 4th Walnut from enforcing its rent assignment rights against the Debtor or the Property. See, e.g., Dupell, supra, 235 B.R. at 794. Therefore, 4th Walnut is prohibited, without obtaining relief from the stay, from sending notification of the assignment to the Debtor's tenants and assuming "constructive possession" of their units. Id.

That said, it must be reiterated at this time that, at the time the bankruptcy petition was filed, the Debtor owned and operated the Property and dealt directly with the tenants that occupied the Property. See, Debtor's Memo, at pp. 6 and 44. Thus, assuming there was no agreement with Sovereign Bank, which there was, in order to assume "constructive possession" of the Property prior to the Petition Date, 4th Walnut had to send written notice to the tenants at the Property before the Petition Date, which 4th Walnut did not do.

Accordingly, the rents under scrutiny are "cash collateral," which the Debtor may use upon reaching an agreement with 4th Walnut or after obtaining a finding by this Honorable Court that 4th Walnut's interest in the rents in question is being adequately protected. See, e.g., 11 U.S.C. §§ 363(c)(2)(A)-(B). See also, Dupell, supra, 235 B.R. at 793-94.

B. In This Matter, As Demonstrated By The Relevant Pleadings And The Memorandum Of Law Submitted By The Debtor On January 6, 2011, After Sovereign Bank Declared a Default and Demanded the Rents under the Sovereign Loan, It Thereafter Reached An Agreement With The Debtor Whereby The Debtor Was Once Again Authorized To Continue to Collect The Rents From the Property

As already noted, 4th Walnut has also argued that the exercise of its assignment rights was not prohibited by the agreement reached by the Debtor and Sovereign Bank on January 29, 2010. See, 4th Walnut's Memo, at ¶¶ 41-102, pp. 11-30. See also, Debtor's Memo, at pp. 30-35. To support this argument, 4th Walnut has proceeded to contend as follows:

(a) The Forbearance Agreement violates the Statute of Frauds. Id., at ¶¶ 48-78, pp. 14-23;

(b) The record belies the claim that there was a meeting of the minds. Id., at ¶¶ 79-90, pp. 24-26;

(c) The material condition precedent of a writing was never satisfied. Id., at ¶¶ 91-95, pp. 26-28;

(d) The Forbearance Agreement would be void in any event for failure or lack of consideration. Id., at ¶¶ 96-102, pp. 28-30.

In short, 4th Walnut contends that the Forbearance Agreement "on which the Debtor bases its attack on the valid pre-Petition termination of the Debtor's right to collect Rents is unavailing because, pursuant to the Statute of Frauds," the Forbearance Agreement is unenforceable. Id., at ¶ 53, p. 16. These arguments and contentions nonetheless fail. The reason is fairly simple.

1. The Statute of Frauds and its Application

There is no doubt that an agreement to forbear from foreclosure, between mortgagor and mortgagee, has been held to represent an interest in land such that the agreement is subject to the Statute of Frauds and must be in writing. See, e.g., Atlantic Financial Federal v. Orianna Historic Assoc., 406 Pa. Super. 316, 319-20, 594 A.2d 356, 357 (1991) citing Eastgate Enterprises, Inc. v. Bank & Trust Co. of Old York Road, 236 Pa. Super. 503, 508, 345 A.2d 279, 281 (1975). The relevant provisions embodied in the Statute of Frauds read as follows:

> " . . . [f]rom and after April 10, 1772, all leases, estates, interests of freehold or term of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof; and moreover, that ***no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said April 10, 1772, be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law*** . . ." (***emphasis added***)

See, Act of March 21, 1772, Sm. L. 389, § 1, codified at 33 Pa. C.S.A. § 1. See also, Liggon-Redding v. Am. Sec. Ins. Co., 2009 U.S. Dist. LEXIS 87331, at *21-*22 FN 6 (M.D. Pa. Sept. 23, 2009); Thatcher's Drug Store v. Consolidated Supermarkets, 535 Pa. 469, 474, 636 A.2d 156, 159 (1994); Charles v. Henry, 460 Pa. 673, 677 FN 1, 334 A.2d 289, 291 FN 1 (1975).

The purpose of the Statute of Frauds is to prevent the possibility of enforcing unfounded, fraudulent claims by requiring that contracts pertaining to interests in real estate be supported by written evidence signed by the party creating the interest. See, Hessenthaler v. Farzin, 388 Pa. Super. 37, 41-42, 564 A.2d 990, 992 (1989). See also, Burns v. Baumgardner, 303 Pa. Super. 85, 94, 449 A.2d 590, 594 (1982) citing Haines v. Minnock Constr. Co., 289 Pa. Super. 209, 215-16, 433 A.2d 30, 33 (1981). It must be noted, however, that the Pennsylvania Courts have emphasized that the Statute is not designed to prevent the performance or enforcement of oral contracts that in fact were made. See, Axler v. First Newport Realty Investors, 279 Pa. Super. 14, 17, 420 A.2d 720, 722 (1980). See also, Keil v. Good, 467 Pa. 317, 322, 356 A.2d 768, 771 (1976); Brown v. Hahn, 419 Pa. 42, 51, 213 A.2d 342, 347 (1965).

Accordingly, it has long been established that a contract within the Statute of Frauds will be accorded full legal effect if those who are entitled to the protection of the Statute choose to affirm the existence of the contract and recognize it as binding on them. See, e.g., Appeal of Lloyd, Huff & Watt, 82 Pa. 485, 488, 1876 Pa. LEXIS 255, at *7 (Pa. S.Ct. Nov. 6, 1876) citing Christy v. Brien, 14 Pa. 248, 249, 1850 Pa. LEXIS 214, at *4 (Pa. S.Ct. Sept. 1850). See also, In re Downington Indus. & Agric. Sch., 172 B.R. 813, 826 (Bankr. E.D. Pa. 1994); Schuster v. Pennsylvania Turnpike Com., 395 Pa. 441, 451-52, 149 A.2d 447, 452 (1959); Lewis v. Spitler, 266 Pa. Super. 201, 209 FN 7, 403 A.2d 994, 998 FN 7 (1979). Similarly, it has been held as well that the Statute of Frauds may be satisfied by something other than a direct written agreement – "that is, other written documents that evidence the existence of such an agreement." See, Strausser v. PRAMCO, III, 944 A.2d 761, 765, 2008 Pa. Super. LEXIS 136, at *9 (Pa. Super. Ct. March 3, 2008). As it was aptly put by the Superior Court,

> " . . . [t]he Statute of Frauds is satisfied by the existence of a written memorandum signed by the party to be charged and sufficiently indicating the terms of the oral agreement so that there is no serious possibility of

> consummating fraud by its enforcement. Keil v. Good, 467 Pa. 317, 356 A.2d 768 (1976). ***Any number of documents can be taken together to make out the necessary written terms of the bargain provided there is sufficient connection made out between the papers, without the aid of parol evidence, further than to identify papers to which reference is made, but not to supply a material term of the contract.*** VOLUME 4, WILLISTON ON CONTRACTS, THIRD EDITION, page 128. See also Dvorak v. Beloit Corp., 65 Pa. D. & C.2d 514, (Chester 1974). The purpose of the Statute of Frauds is to prevent the enforcement of unfounded fraudulent claims by requiring that contracts pertaining to interests in real estate be supported by written evidence . . ." (***emphasis added***)

Id., 2008 Pa. Super. LEXIS 136, at *9-*10. See also, Downington Indus. & Agric. Sch., supra, 172 B.R. at 826 quoting Sall v. Mueller Brass Co., 361 Pa. 449, 452, 65 A.2d 236, 237 (1949) quoting in turn Brister & Koester Lumber Corp. v. American Lumber Corp., 356 Pa. 33, 39, 50 A.2d 672, 676 (1947) (*recognizing that "'[t]he required memorandum for [the] . . . purpose [of the Statute of Frauds] need not be a single writing, entire within itself; it may consist of several writings; and, if they bear connecting reference one to the other or have even an undisclosed but actual relation, which oral evidence may be used to show, they may be sufficient, when taken together, to supply the [S]tatute's requirement for a writing'"*); Haines, supra, 289 Pa. Super. at 215-16, 433 A.2d at 33 (*acknowledging that "[a]ny number of documents can be taken together to make out the necessary written terms of the bargain provided there is sufficient connection made out between the papers, without the aid of parol evidence, further than to identify papers to which reference is made, but not to supply a material term of the contract"*).

Applying these strictures against the arguments and contentions specifically raised by 4th Walnut, there is no doubt that the Statute of Frauds is satisfied by the existence of other written documents of the parties evidencing the oral agreement at hand. In that regard, a careful review of the relevant record confirms the existence of the following documents:

(a) The letters jointly signed by counsel for Sovereign Bank and a representative of the Debtor on January 29, 2010, which were hand delivered to all of the tenants residing at the Property directing the tenants to remit their rents back to Greentree, pursuant to the terms of their respective leases.[3] See, e.g., Exhibit "D-3". See also, T, at pp. 31-32.

(b) The Praecipe to Discontinue the Foreclosure Action signed and filed by counsel for 4th Walnut on July 23, 2010.[4] See, e.g., Bankr. Doc. No. 90 - a true and correct copy of the Praecipe to Discontinue, without prejudice, the Foreclosure Action was attached as Exhibit "D-4" to the Response and Affirmative Defenses to the Objection and Cross Motion, at ¶ 61, p. 18.

As if these written documents were not enough, it must be reiterated at this time that, from January 29, 2010 through July 2010, the Debtor operated in reliance on the Forbearance Agreement.[5] See, Debtor's Memo, at pp. 8, 32. In so doing, each letter that forwarded the accounting of the rents collected, bills paid and the net payment to Sovereign Bank reflected that these payments were " . . . being provided in accordance with the agreement . . . reached, in principal, during the meeting held at your offices on January 29, 2010." See, Exhibit "B". See also, Debtor's Memo, at p. 8, FN 8; Exhibit "D-5"; Exhibit "D-6"; Exhibit "D-7". In short, as

[3] As initially indicated in the Debtor's Memo, pursuant to the Forbearance Agreement, the Debtor and Greentree were specifically authorized by Sovereign Bank to continue to collect the rents from the Property after Sovereign Bank had declared a default and demanded the rents from the tenants. See, T, at pp. 31-33; Exhibit "D-3". See also, Debtor's Memo, at pp. 8, 31-32.

[4] As initially indicated in the Debtor's Memo, pursuant to the Forbearance Agreement, Sovereign Bank agreed to withdraw the Complaint in Mortgage Foreclosure it initially filed and took no further action with respect to said Complaint. See, T, at pp. 30-31. See also, Exhibit "D-3" attached to the Response and Affirmative Defenses to the Objection and Cross Motion to evidencing that Sovereign Bank took no further action in connection with the Foreclosure Action after it reached the Forbearance Agreement identified above with the instant Debtor; Debtor's Memo, at pp. 8, 31. As the buyer/assignee of the Loan Documents, 4th Walnut is bound the terms of the Forbearance Agreement. See, e.g., Exhibit "D-4" attached to the Response and Affirmative Defenses to the Objection and Cross Motion, at ¶ 61, p. 18. See also, Debtor's Memo, at pp. 32-33.

[5] In other words, as initially indicated in the Debtor's Memo, under the Forbearance Agreement, the Debtor continued to (a) collect the rents on the Property it owns, (b) pay the expenses associated with the Property and (c) remit to Sovereign Bank the net rents after payment of the expenses for the Property. See, T, at pp. 30-31, 34. See also, Debtor's Memo, at pp. 7-8, 32. Further, interest was to be charged at the contract rate, not the default rate, and the term of the forbearance was to continue until the maturity date of the Mortgage on March 1, 2011. See, T, at pp. 30-31, 38. See also, Debtor's Memo, at pp. 7-8, 32.

reflected by these written documents, the Statute of Frauds is satisfied by the existence of written memoranda signed by the party to be charged and sufficiently indicating the terms of the oral agreement so that there is no possibility of consummating fraud by its enforcement. Therefore, the Statute of Fraud contentions raised by 4th Walnut must be rejected in their entirety.

2. Additional Arguments Under the Statute of Frauds

In addition to the foregoing arguments and contentions addressed above, 4th Walnut has also argued that (i) the record belies the claim that there was a meeting of the minds; (ii) the material condition precedent of a writing was never satisfied; and (iii) the Forbearance Agreement would be void in any event for failure or lack of consideration. See, 4th Walnut's Memo, at ¶¶ 79-102, pp. 24-30. See also, p. 11, supra. These arguments ultimately fail . . .

At the outset, it is important to note that the argument raised by 4th Walnut that there was no "meeting of the minds" is disingenuous at best. The crucial element in determining the existence of a given contract is whether both parties manifested an intention to be bound. See, ATACS Corp. v. Trans World Communs., Inc., 155 F.3d 659, 666 (3rd Cir. 1998) quoting Channel Home Centers, Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291, 298-99 (3rd Cir. 1986) quoting in turn Lombardo v. Gasparini Excavating Co., 385 Pa. 388, 392-93, 123 A.2d 663, 666 (1956). In assessing intent, the object of inquiry is not the inner, subjective intent of the parties, but rather the intent a reasonable person would apprehend in considering the parties' behavior. See, e.g., Ingrassia Constr. Co. v. Walsh, 337 Pa. Super. 58, 66, 486 A.2d 478, 483 (1984). See also, Rambo v. Greene, 906 A.2d 1232, 1236, 2006 Pa. Super. LEXIS 2214, at *9 (Pa. Super. Ct. Aug. 23, 2006), on remand at, 2008 Phila. Ct. Com.

Pl. LEXIS 209 (Pa. C.P. Sept. 5, 2008), aff'd without opinion by, 2009 Pa. Super. LEXIS 6675 (Pa. Super. Ct., Dec. 29, 2009) citing Long v. Brown, 399 Pa. Super. 312, 320, 582 A.2d 359, 363 (1990). Accordingly, "a true and actual meeting of the minds is not necessary to form a contract." See, Ingrassia Constr. Co., supra, 337 Pa. Super. at 66, 486 A.2d at 482. As it was stated by the Third Circuit,

> " . . . Pennsylvania law has 'long recognized the principle that documents, having the surface appearance of contracts may be in fact evidence of mere negotiating by parties with a view toward executing a binding contract in the future.' Goldman v. McShain, 432 Pa. 61, 247 A.2d 455, 458 (Pa. 1968). Accordingly, ***'[i]t is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract.'*** Channel Home Ctrs., 795 F.2d at 298; ATACS, 155 F.3d at 666-67 ('[I]t is well established that evidence of preliminary negotiations or a general agreement to enter a binding contract in the future fail as enforceable contracts because the parties themselves have not come to an agreement on the essential terms of the bargain and therefore there is nothing for the court to enforce.'); Lombardo, 123 A.2d at 666 ('Plaintiff's testimony clearly shows that the parties intended only to enter into a binding agreement sometime in the future. In such a case, the preliminary negotiations do not constitute a contract.'). ***On the other hand, however, 'parties may bind themselves contractually although they intend, at some later date, to draft a more formal document.'*** Goldman, 247 A.2d at 459. ***Thus, '[m]utual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof . . . .'*** RESTATEMENT (FIRST) OF CONTRACTS § 26 (1932) . . ." (***emphasis added***)

See, Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 582 (3rd Cir. 2009). See also, Field v. Golden Triangle Broadcasting, Inc., 451 Pa. 410, 418, 305 A.2d 689, 693 (1973), cert. denied, 414 U.S. 1158, 94 S.Ct. 916, 39 L.Ed.2d 110 (1974) quoting Melo-Sonics Corp. v. Cropp, 342 F.2d 856, 859-60 (3rd Cir. 1965) and Goldman v. McShain, 432 Pa. 61, 69, 247 A.2d 455, 459 (1968) (*recognizing that "'it is well-settled in Pennsylvania that where the parties have settled upon the essential terms and the only remaining act to be done is the formalization of the agreement, the latter is not inconsistent with the present contract'" and* *that "'Section 26 of the Restatement of Contracts specifically recognizes that parties may bind themselves contractually although they intend, at some later date, to draft a more formal document'"*).

Upon review of the relevant record, the applicability of these excerpts are apparent. First, on January 29, 2010, Sovereign Bank orally acquiesced not to prosecute the Complaint in Mortgage Foreclosure it initially filed and, consequently, agreed to withdraw the same. See, T, at p. 31. See also, Exhibits "D-3"[6] and "D-4"[7] attached to the Response and Affirmative Defenses to the Objection and Cross Motion; Debtor's Memo, at pp. 8 and 30-31. Secondly, on that same date, counsel for Sovereign Bank also agreed to jointly sign letters with a representative of the Debtor that were hand delivered to all of the tenants residing at the Property directing the tenants to remit their rents back to Greentree, pursuant to the terms of their respective leases. See, e.g., T, at pp. 31-33. See also, Exhibit "D-3", Debtor's Memo, at pp. 8 and 31-32. In short, in so agreeing, Sovereign Bank specifically authorized the Debtor and Greentree to continue to collect the rents from the Property after Sovereign Bank had declared a default and demanded the rents from the tenants. Id.

For these reasons, under the Agreement reached by the parties, the Debtor was to continue to (a) collect the rents on the Property it owns, (b) pay the expenses associated with the Property and (c) remit to Sovereign Bank the net rents after payment of the expenses for the Property. See, T, at pp. 30-31, 34. See also, Debtor's Memo, at pp. 7-8 and 32. Further, interest was to be charged at the contract rate, not the default rate, and the term of the forbearance was to continue until the maturity date of the Mortgage on March 1, 2011. See, T, at pp. 30-31, 38. See also, Debtor's Memo, at pp. 7-8 and 32. Therefore, from January 29, 2010 through July of that year, the Debtor operated in reliance of this Forbearance Agreement.

---

[6] As already noted, Exhibit "D-3" was attached to the Response and Affirmative Defenses to the Objection and Cross Motion to evidence that Sovereign Bank took no further action in connection with the Foreclosure Action after it reached the Forbearance Agreement identified above.

[7] As already noted, Exhibit "D-4" was the Praecipe to Discontinue the Foreclosure Action signed and filed by counsel for 4th Walnut on July 23, 2010.

This being so, and despite 4th Walnut's arguments to the contrary, the fact that Sovereign Bank intended, at some later date, to draft a more formal document is of no consequence. The relevant record demonstrates that the parties mutual manifestations of assent were in themselves sufficient to make a valid and binding contract. See, e.g., Am. Eagle Outfitters, supra, 584 F.3d at 582. See also, Ingrassia Constr. Co., supra, 337 Pa. Super. at 66, 486 A.2d at 482-83 citing 1 S. WILLISTON, WILLISTON ON CONTRACTS §§ 66, 94 (3rd ed. 1957) and 1 A. CORBIN, CORBIN ON CONTRACTS § 107 (1963) (*acknowledging that "[a] true and actual meeting of the minds is not necessary to form a contract"*).

Moreover, it is important to also note for purposes of this analysis that the argument raised by 4th Walnut to the effect that "[t]he material condition precedent of a writing was never satisfied" is irrelevant at best. See, e.g., 4th Walnut's Memo, at ¶¶ 91-95, pp. 26-28. As already noted, "the Statute of Frauds may be satisfied by something other than a direct written agreement – 'that is, other written documents that evidence the existence of such an agreement.'" See, p. 13, supra. See also, Downington Indus. & Agric. Sch., supra, 172 B.R. 826; Strausser, supra, 944 A.2d at 765, 2008 Pa. Super. LEXIS 136, at *9; Haines, supra, 289 Pa. Super. at 215-16, 433 A.2d at 33. Accordingly, a careful review of the relevant record effectively confirms the existence of such documents. See, e.g., Exhibit "D-3. See also, Exhibit "D-4" attached to the Response and Affirmative Defenses to the Objection and Cross Motion. In fact, a careful review of the same record ultimately confirms that the written information contained therein not only addresses material terms of the Forbearance Agreement of the parties, but the signatures in both of those documents belong to the lender's representatives. Id.

It is important to then note that the argument raised by 4th Walnut that the "Forbearance Agreement would be void in any event for failure or lack of consideration" is no different either. See, e.g., 4th Walnut's Memo, at ¶¶ 96-102, pp. 28-30. The reasoning behind this conclusion is relatively obvious. As it has been articulated by the Pennsylvania Supreme Court:

> " . . . '[t]here is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not': 13 C.J. 316. ***'Refraining from bringing a suit may furnish a consideration. The actual forbearance, or the promise to forbear, to prosecute a claim on which one has a right to sue is universally held to be a sufficient consideration'***: 13 C.J. 344 . . ." (***emphasis added***)

See, York Metal & Alloys Co. v. Cyclops Steel Co., 280 Pa. 585, 589, 124 A. 752, 754 (1924). See also, In re Pennsylvania Footwear Corp., 204 B.R. 165, 176 (Bankr. E.D. Pa. 1997) (*determining that forbearance agreements have long been recognized in Pennsylvania as legitimate contracts and that forbearance from suing is adequate consideration*); Third Nat'l Bank & Trust Co. v. Rodgers, 330 Pa. 523, 525, 198 A. 320, 321 (1938) (*recognizing that "[i]t is well settled that consideration may be a detriment to the promisee as well as a benefit to the promisor"*); General Mills, Inc. v. Snavely, 203 Pa. Super. 162, 168, 199 A.2d 540, 543 (1964) (*acknowledging that "[a] promise to forbear from prosecuting a claim is sufficient consideration, . . ., as also is the compromise of a claim"*).

In this matter, the relevant record shows that, pursuant to the Forbearance Agreement, Sovereign Bank agreed to withdraw the Complaint in Mortgage Foreclosure it initially filed and took no further action with respect to said Complaint. See, T, at pp. 30-31. See also, Exhibit "D-3" attached to the Response and Affirmative Defenses to the Objection and Cross Motion to evidencing that Sovereign Bank took no further action in connection with the Foreclosure Action after it reached the Forbearance Agreement identified above with the instant Debtor; Debtor's Memo, at pp. 8, 31. Therefore, the forbearance ultimately agreed upon by Sovereign Bank provided the requite consideration under the terms of the Agreement. All in all, the arguments and contentions raised by 4th Walnut must be rejected in their entirety.

CONCLUSION

For the foregoing reasons, there is no doubt that the Debtor has an interest in the rents in question and that these rents are "cash collateral" in accordance with 11 U.S.C. § 363.

Respectfully submitted,

MASCHMEYER KARALIS P.C.

By: */s/ Aris J. Karalis*
ARIS J. KARALIS
FRANK S. MARINAS
1900 Spruce Street
Philadelphia, PA 19103
(215) 546-4500
Attorneys for the Debtor

Dated: January 11, 2011